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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. _____

LORETTA M. YOUNG

v.

WILLIAM M. DALEY, SECRETARY OF COMMERCE,
U.S. DEPARTMENT OF COMMERCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

PETITION FOR A WRIT

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Counsel for Petitioner

December 1, 1998

77 pp

QUESTIONS PRESENTED

1. Whether the constitution permits a quota-based affirmative action program such as military veteran preference to be applied in a reduction-in-force in a non-competitive manner that deprives a woman of her long-term federal employment, when she did not have an equal opportunity to obtain veteran status based solely on her sex as a woman.

2. Whether application of veteran preference in a governmental reduction in force to deprive petitioner of her long termed employment is tantamount to a "Title of Nobility" for the men military veterans.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

Petitioner, Loretta Young, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia entered in this proceeding on September 2, 1998.

DECISIONS BELOW

The decision of the Court of Appeals for the District of Columbia is not reported and appears in the Appendix 1a hereto. The opinion of the United States District of Columbia is not reported and appears in Appendix 3a hereto.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered on September 2, 1998 and this petition for certiorari is filed within 90 days of that date. This Court's juridiction is invoked under 28 U.S.C. Sec.1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statute and regulation involved are located at 5 U.S.C. 3502 and 5 C.F.R. 351.501 dealing with military veteran preference in a reduction-in-force.

STATEMENT OF THE CASE

Petitioner began her employment with the government of the United States (the federal government) on July 2, 1962. Ms. Young was separated from her employment with the federal government on December 21, 1996. Ms. Young worked for the Minority Business Development Agency (MBDA or the Agency) of the Department of Commerce as a Program Analysis Officer (GM-0343-15); Ms. Young's total service to the federal government was over thirty-four (34) years. Ms. Young's separation was the direct result of a veteran preference reduction-in-force (RIF) run by MBDA.

Ms. Young was separated from her employment with the federal government solely because she is a female non-veteran. Ms. Young has earned a Masters Degree in Public Administration and

Governmental Administration. Throughout Ms. Young's employment with the federal government, her performance evaluations have been commendable to outstanding. Ms. Young has served and excelled at senior-level positions throughout her tenure with MBDA; Ms. Young even served as Deputy Director and as Acting Director of the Agency during her career.

The employees of MBDA who were not separated as a result of the RIF were all employees who had less seniority than Ms. Young. There were no female veterans in MBDA at the time of the RIF, and but for the veteran preference as applied to the RIF, Ms. Young would not have been separated from her employment with the federal government.

Ms. Young, as a female non-military veteran was separated without an opportunity to compete for a position in

MBDA with any of the male military veteran employees with less seniority than her. In fact, all of the male military veteran employees of MBDA retained their employment while approximately forty-five (45) women employees, including Ms. Young, were terminated.

REASONS FOR GRANTING THE WRIT

1. AS APPLIED IN THIS CASE, THE MILITARY VETERAN PREFERENCE IN A REDUCTION-IN-FORCE IS A SEX BASED AFFIRMATIVE ACTION THAT CONTRAVENES THE CONSTITUTION

This appeal raises substantial constitutional questions concerning the constitutionality of a federal statute and regulations (5 U.S.C. 3502 and 5 C.F.R. 351.501) (military veteran preference in a reduction-in-force) as applied in a RIF. This case presents this court with an opportunity to determine, constitutionally, how the quota-based affirmative action program called military

veteran preference is to be fairly applied in a reduction-in-force in light of this Court's recent opinions in United States v. Virginia, 116 S.Ct. 2264 (1996), Adarand Construction, Inc. v. Pena, 115 S.Ct. 2097 (1995) and Wygant v. Board of Education, 476 U.S. 267, 282-284 (1986).

Petitioner's challenge to the military veteran preference in MBDA's RIF must be viewed in the historic context in which she was denied a full, fair and equal opportunity for acquiring the qualifying criterion of military service sufficient to warrant the governmental preference during a reduction-in-force. During MBDA's recent reduction-in-force, the difference in the male (12) and female (0) military veterans in MBDA is the direct result of unconstitutional governmental sanctioned discrimination in the military services. See generally, Blumberg, DeFacto and De

Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 Buffalo L. Rev.1, 46 (1976-77). Unlike men employees of MBDA, Petitioner and all of the other women terminated during MBDA's RIF were excluded from the military drafts of this country based solely on their gender. This invidious exclusion from the military draft is based on the unconstitutional governmental notion and judgment that women were not capable of equal service in the armed forces. Id. at 46 n.247. See also, Brown and Emerson, The Equal Rights Amendment: A Constitution Basis for Equal Rights for Women, 80 Yale L.J. 872,967 (1971). With brief and narrow exceptions, when Petitioner was born in 1939, women were subjugated to men by governmental policy and were not permitted to enlist in the armed forces. Subject to a two percent quota, women were not permitted to

enlist until 1948. See, Blumberg, DeFacto and De Jure Sex Discrimination, 26 Buffalo L. Rev. at 46-47. After women were permitted to enlist in the armed forces, "[f]rom 1948 to 1967, women were limited by statute to a maximum of two percent of the personnel of the armed forces". Id. at 47. See also, Note, The Equal Rights Amendment and the Military, 82 Yale L.J. 1533 (1973). Even after 1967, when Petitioner was employed with MBDA (then OMBE), the Army continued to maintain a "two percent limitation by regulation." See, Blumberg, DeFacto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 Buffalo L. Rev. at 47. In addition to the above governmental quota and limitation on the number of women permitted in the military, "[w]omen were subjected to more stringent enlistment qualifications than men" and "women's

opportunities for training, advancement and retention" were restricted based on their gender. Id.

The recent abandonment of some of these past mandatory gender based discriminatory policies and practices shed much light on whether such gender based discriminatory policies and practices were ever necessary or justified. Id. at 47 n.252. See also, Connecticut v. Teal, 457 U.S. at 455. See also, Blumberg, DeFacto and De Jure Sex Discrimination, 26 Buffalo L. Rev. at 48

The lower federal courts erred in finding that the veteran preference is not affirmative action legislation for men in the military. It is affirmative action legislation because Petitioner lost her job to the men military veterans as a direct result of the military services having traditionally "included only a negligible number of women in relation to

the number of men[1], [and] it is inevitable that these statutory preferences operate almost exclusively to the advantage of

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[1]Department of Defense statistics reveal the following numerical and percentage breakdowns for total personnel in the army, air force, navy, and marines for selected years from 1940 through 1976:

Year	Total Armed Forces Personnel	Men	Women	%Women
1940	58,365	456,984	1,381	0.30%
1941	1,801,101	1,794,997	6,104	0.34%
1942	3,858,791	3,844,538	14,253	0.37%
1943	9,044,745	8,918,574	126,171	1.39%
1944	11,451,715	11,241,173	210,542	1.84%
1945	12,123,455	11,858,449	265,006	2.19%
1946	3,030,088	2,972,081	58,007	1.91%
1947	1,582,999	1,563,241	19,758	1.25%
1950	1,460,261	1,438,192	22,069	1.51%
1951	3,249,455	3,209,830	39,625	1.22%
1955	2,935,107	2,899,916	35,191	1.20%
1957	2,795,798	2,763,625	32,173	1.15%
1959	2,504,174	2,472,456	31,718	1.27%
1962	2,807,819	2,775,606	32,213	1.15%
1966	3,094,058	3,061,469	32,589	1.05%
1968	3,547,902	3,509,505	38,397	1.08%
1969	3,460,656	3,420,565	39,506	1.14%
1970	3,066,294	3,024,815	41,479	1.35%
1971	2,714,727	2,671,952	42,775	1.58%
1972	2,323,079	2,278,046	45,033	1.94%
1974	2,220,435	2,151,203	69,229	3.12%
1975	2,234,814	2,145,100	89,714	4.01%
1976	2,089,656	1,982,460	107,196	5.13%

These figures are taken from Fleming & Shanor, Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination? 26 Emory L. J. 13, 13-14 (1977). The above years reflects Petitioner's ages from age 1 to age 36.

male job applicants." See, Fleming & Shanor, Veteran's Preferences in Public Employment: Unconstitutional Gender Discrimination? 26 Emory L. J. 13, 14-15 (1977). In the context of this case, military veterans and males veterans are synonymous. A 98% quota establishing and maintaining positions in military service for men make it clear beyond cavil that any governmental veteran preference RIF would guarantee jobs to 98% men over women. This facet of American military culture warrants the conclusion that the military was, and is, male dominated and that retaining a job in a RIF favoring veterans prefer men over women.

2. Petitioner Is Only Challenging Veteran Preference Application During a Reduction in Force (RIF)

The present case is not about invalidating veterans' preference as a whole. This case is simply about a narrow unconstitutional aspect of veterans' preference; that is, this case is about

whether there is an exceedingly persuasive justification for granting a preference to non-disabled male veterans in a RIF while denying Ms. Young an opportunity to compete with those non-disabled male veterans for an opportunity to retain her long-term employment with the federal government.

But for Young's sex and non-military veteran's status, she would have prevailed over each of the 12 men military veterans in a non-preferential reduction-in-force competition. The total number of women who lost their jobs in MBDA's reduction-in-force was 45. There were no female military veterans in MBDA during the recent reduction-in-force.

This Court has counseled in reduction-in-force context that: "Denial of a future employment opportunity is not as intrusive as loss of an existing job." Wygant v. Jackson Board of Education, 476 U.S. at 282-83. Young has lost her long-

term federal employment -- without competition -- based solely on her sex and non-military veteran status.

It would be a failure of justice if our modern judicial, in the light of the U.S. Constitution would permit, without serious judicial review or challenge, the federal government to reward men military veterans for fighting for their country, while excluding women from the military draft and combat, in order that men veterans can obtain the government sanctioned advantage of replacing better qualified, women non-military veterans, such as Young, without competition, in civil service jobs during a veterans' preference reduction-in-force.

3. PETITIONER'S EQUAL PROTECTION CLAIM

It is the inevitable impact of Congress' intentional discrimination against women in the military which has resulted in the skewed and disproportionate levels of men remaining

in an unconstitutionally favorable position of retention in the civil service during a RIF. The inevitable impact of veteran preference in the applicable RIF in this case is unconstitutionally gender-based.

In analyzing the law in Feeney, and acknowledging the "greater burden upon women as a group than upon men as a group," the Court noted "the history of discrimination against women in the military is not on trial in this case." Feeney, 442 U.S. at 278. But indeed for Ms. Young, in this military veteran preference RIF situation, the history of discrimination against women in the military is directly on trial.[2]

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[2]It is the distinct history of discrimination in the military against women which distinguishes the present case from White v. Gates, 253 F.2d 868 (1958), and Fredrick v. United States, 507 F.2d 1264 (Ct. Cl. 1974). Both White and Fredrick dealt with males who believed they had been discriminated against by operation of veterans' preference statutes. Neither case could deal with the complex gender issue which has resulted in the separation of Ms.

Here, Young has offered in this case both a discriminatory purpose and a discriminatory impact of Congress' unconstitutional action in preventing her from having an equal opportunity to serve in the Armed Forces, and then creating and reaffirming, a benefit of which only an overwhelming majority of men would be able to take advantage. Congress not only enacted the statute with the discriminatory impact it would have in

---

Young from her federal employment, nor should the analysis of either case devolve to the present case. Moreover, this Court's decision in the Regan case did not involve a reduction-in-force nor a challenge to the constitutionality of any of the military veteran statutes or regulations that is challenged in this appeal. This Court's pronouncements in Regan are at best obiter dicta and not controlling concerning the issues raised in this appeal. Moreover, the decision of the this Court in Regan and the cases relied upon by Regan are questionable because they pre-date the recent constitutional pronouncements from the Supreme Court concerning impermissible preferential legislation and regulations. Cf. United States v. Virginia, 116 S.Ct. 2264(1996), Adarand Construction, Inc. v. Pena, 115 S.Ct. 2097(1995) and Wygant v. Board of Education, 476 U.S. 267, 282-284 (1986).

mind, but it has since reaffirmed its discriminatory purpose.

Ms. Young's reliance on the decisions of the Supreme Court in Adarand v. Pena, __ U.S. __, 115 S.Ct. 2097 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); and Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), are consistent with the dictates of the Supreme Court.

The dictates of the Supreme Court have been clear and consistent; in Adarand, Croson, and Wygant, this Court has limited the government's use of remedial actions which benefit one group over another where there has been no finding of disadvantage or need for remedial action. The present case only logically extends from this line of cases; there has been no finding that male non-disabled veterans need such a benefit. Where the benefit granted to non-disabled veterans works to protect only males who work in a federal agency, and would

unfairly dislodge a woman from her federal position after thirty-four (34) years of service. In accordance with the Supreme Court's standard in United States v. Virginia, ___ U.S. ___, 116 S.Ct. 2264, 2275 (1996), along with its position in Adarand, Croson, and Wygant, the government should be required to come forward with an exceedingly persuasive justification for such a benefit to male non-disabled veterans. The lower Courts erred in failing to apply heightened scrutiny to the male based affirmative action program in this case.

Applying the basic equal protection principles of the Fifth Amendment to the Constitution, i.e., that "the Constitution protects persons, not groups" to a challenged preferential program in Adarand Construction, Inc. v. Pena, 115 S. Ct at 2113, this Court revisited its holding in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), and overruled Metro

Broadcasting to the extent that it was inconsistent with its holding in Adarand. Adarand at 2113. See, Wygant v. Board of Education, 476 U.S. at 282-83. More recently, this Court held that under an equal protection analysis, a governmental "actor controlling gates to opportunity...may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females." Cf., United States v. Virginia, 116 S.Ct at 2280. In short, this Court has made it clear that under equal protection principles, governmental "actors may not rely on 'overbroad' generalizations to make 'judgment about people that are likely to . . . perpetuate historical patterns of discrimination"). Id. In Wygant v. Jackson Board of Education, 476 U.S. 267, 282-284 (1986), this Court struck down a preferential-layoffs scheme that unduly imposed a burden on innocent parties. Wygant, 476

U.S. at 282-284. See also, Adarand Construction, Inc. v. Pena, 115 S.Ct. 2097 (1995). Young has lost her long-term federal employment because of a federal governmental prejudice about her gender.

In enacting the reduction-in-force veterans preference contained in the Veterans' Preference Act of 1944, as amended (5 U.S.C. 3502), Congress has exceeded its authority under the Constitution. Congress has a constitutionally imposed duty not to discriminate against women, such as Young, because of their gender and non-veteran status. The layoff burden imposed on Young is too intrusive, especially after 34 years of faithful, federal service. Seniority is a much less intrusive and fair method to make layoff decisions. It has been recognized that "rights upon layoff could hardly provide any substantial incentive for joining the military." See, Fleming & Shanor,

Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination? 26 Emory L. J. 13, 57-58 (1977).

Simply because she is a woman, Young was never permitted to register for a draft or to be inducted into the military on an equal basis with her male counterparts. Cf. S. Rep. No. 826, 96th Cong., 2d Sess., reprinted in 1980 U.S.Code Cong. & Ad. News 2612, 2649. See, Rostker v. Goldberg, 453 U.S. 57 (1981). See also, Tribe, American Constitutional Law, 1573 (1988) ("But Rostker can also be seen as yet another instance of courts invoking a legacy of female subordination to men to justify further gender discrimination. By being excluded from the draft and barred from service in many of the military capacities open to men, including combat, women lose major economic opportunities and are effectively denied equal status as

citizens with full civic obligations commensurate with those of male members of the society.") Id. It is such military exclusions and limitations that have limited careers for women in the military and have limited the access of women to incidents of military service such as the veterans' preference reduction-in-force in federal employment. Id. In short, Petitioner has been denied by law an equal opportunity to fight in the military for her country. See generally, Note, An Equal Right to Fight: An Analysis of the Constitutionality of Laws and Policies That Exclude Women From Combat in the United States Military, 93 W. Va. L. R. 412 (1991) and Gender Discrimination in the Military:The Unconstitutional Exclusion of Women in Combat, 17 Val.U.L.R. 547 (1983).

Congress' opposition to a Presidential expressed intent to register women for the draft is illustrative of a

deep-seated bias and stereotyped view of Petitioner and women as second class citizens. The legislative history. Id.

Congress has unconstitutionally made the military service a majority male domain with the intentional and inevitable effect of granting to men military veterans a lifetime preference that is denied to Young because of her gender and non-veteran status. Congress has unconstitutionally exposed Young to a reduction-in-force system that is designed to benefit men over women. Congress' biased intent in this area is clear from the above legislative history. See, S. Rep. No. 826, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 2612, 2649.

Congress, as a governmental actor, cannot ignore the constitutional duty requiring equal protection simply by invoking national security. This is clear from the recent ruling of this Court in

United States v. Virginia, 116 S.Ct at 2280.

Petitioner presented direct evidence of Congress' gender bias purpose concerning limiting women's participation in military service and the benefits that derive from participation therein. See, S.Rep. No. 826, 96th Cong., 2d Sess., reprinted in U.S. Code Cong. & Ad. News 2612, 2649.

In addition, Congress' deep-seated bias and stereotyped view of women in the military is illustrated by the following legislative history:

> "Finally, the committee finds that there are important societal reasons for not changing our present male-only system of registration and induction . . . . A decision which would result in a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored.

Moreover, the District Court misapprehended the discrimatory nature of Congressman LaFollette's gender bias argument to get Congress to enact legislation to benefit the husbands of disabled women veterans. Congressman LaFollette had to convince the Congress that a quota on women in the military would prevent a dilution of the "rights of disabled men." Congressman LaFollette's words are illustrative:

> "Now, there was some inference, I thought, in Mr. Rice's letter to Mr. Ramspeck that in case of disabled women getting these preferences, there might be a dilution of the rights of disabled men . . . . These percentages I will give bear out that fact . . . . If I am correct, that is roughly a percentage of 2 percent women.

See, Preference in Employment of Honorably Discharged Veterans Where Federal Funds are Disbursed, 78th Cong., 2d Sess. 1, 14-15 (1944).

The veteran preference as applied in a RIF embodies the history of women in the military and the limitation and exclusion of women therefrom. It was this challenge to the discriminatory history of women in the military as is encysts in the veteran preference RIF that is at issue in this case. In the light of the historical quota imposed on women in the military, Petitioner has demonstrated that veteran preference in a RIF was devised and operated to accomplish the collateral goal of keeping women, such as Young, in stereotypic and predefined place in society, i.e., out of the workplace. This is unconstituional.

4. Application Of Veteran Preference In A RIF To Deprive Petitioner Of Her Long Termed Employment Is Tantamount To A "Title of Nobility" For the Men Military Veterans

There has been little case law with reference to what is a title of nobility.

See, Eskra v. Morton, 524 F.2d 9, 13 n.8 (1975). The cases that have truly address the titles of nobility clause consistently disclose that the rationale behind the constitutional prohibition to granting titles of nobility is that the Federal Government must treat all of its citizens as being equal in the eyes of the law. Eskra v. Morton, 524 F.2d at 13. The concept of nobility is one which encompasses the conferring of a benefit upon one class of persons simply because they belong to that class; its prohibition is the extension of the principle of equal protection. See generally, Note, Titles of Nobility and The Preferential Treatment of Federally Employed Military Veterans, 19 Wayne L. Rev. 1169 (1973). The aspect of the veteran designation which creates the existence of noble status is that part of the statute that affords male veterans individual rights which are beyond those of the common female citizens who were

prevented because of gender from acquiring the qualifying condition of military service. Id. at 1186. In the civilian RIF scenario, status as a veteran creates for a male civil service employee with military service a retention characteristic which is wholly inapplicable to the related work environment and the female employees in such work environments who were not allowed, because of their birth as females, to acquire the all-important military service experience or status as was granted to men. Under this analysis, male veterans possess rights within the civil service which are not shared by their subjugated female non-veteran co-workers based on an accident of birth. Cf. Id. at 1193. In essence, male military veterans have a permanently superior status over female non-military veterans working for the federal government based on the superior

birthright of men. In the eyes of the military, women are born the illegitimate sex.

Thus, non-disabled male veterans acquire a title of nobility in the veterans preference circumstances because they receive benefits strictly because of the class which Congress has created for persons who are born men. Congress has conferred the title of nobility upon these non-disabled male veterans by creating a special class for non-disabled male veterans which protects them from competing on the basis of merit for a position within the civil service. The system which Congress has created specifically selects a disproportionate number of men for preferential treatment, thus establishing a privileged class which the Constitution prohibits. Moreover, the male military veterans have reaped the reward of the privilege in retaining civil service positions through a title of

nobility; a privilege which our system of government was designed to prohibit.

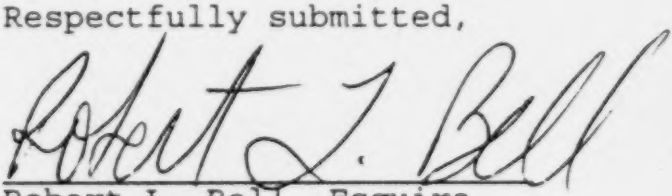
Veteran preference as applied in this RIF case is based on the birth and lineage of women as women. It embodies the notion that women are born inferior to men and thus are properly excluded or limited in their ability to serve in the military equal to men. There is nothing quid pro quo about taking a job from a woman who has served her government for 30 years and giving it to a man simply because he had an opportunity to serve in the military service while Petitioner served in the civilian service. Because of the 98% quota enjoyed by men in the military in Petitioner's age group, the benefits of veteran preference are based on the accident of birth as men or the biological lineage they share with other men. As applied in this case, Congress established this unfair condition for Petitioner based on gender, with full knowledge that 98% of

men would benefit from veteran preference. Unlike Petitioner, men non-veterans are not stigmatized with the badge of inferiority that Petitioner and other women who were limited and excluded by governmental mandate from acquiring, i.e., the qualifying condition of military service that all men are born with a presumption of military eligibility in their favor.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the lower federal courts in the District of Columbia.

Respectfully submitted,



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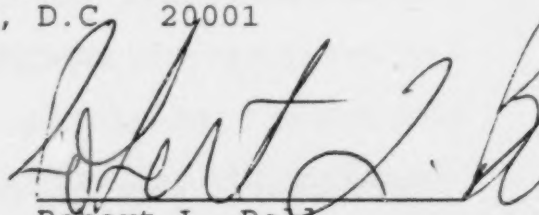
Counsel for Petitioner

CERTIFICATE OF SERVICES

This is to certify that three copies of the foregoing Petition for Writ of Certiorari was served by first class mail, postage pre-paid, this **1st** day of December, 1998, to:

Eric M. Jaffe, Esquire
Assistant United States
Attorney
Judiciary Center Building
555 4th Street, N.W.
Washington, D.C. 20001



Robert L. Bell

A P P E N D I C E S

APPENDIX A

United States Court of Appeals
For The District Of Columbia Circuit

No. 98-5181 **September Term, 1998**
96cv02733

Loretta M. Young,
Appellant

v.

William M. Daley, Secretary of Commerce,
U.S. Department of Commerce,
Appellee

BEFORE: Wald, Williams, and Rogers,
Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply it is

ORDERED that the motion be granted substantially for the reasons stated by the district court in its memorandum opinion and order filed April 27, 1998. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.)(per curiam), cert denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam
[Signed]

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LORETTA M. YOUNG,
Plaintiff,

v. Civil Action No. 96-02733 (CKK)

WILLIAM DALEY,
SECRETARY OF COMMERCE,
Defendant

ORDER

Upon considering the cross-motions for summary judgment, the oppositions, the replies, the arguments presented on the record on October 31, 19[9]7, and the relevant law, it is this 27th day of April, 1998, hereby

ORDERED that the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, is **GRANTED**; and it is

FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment is **DENIED**; and it is

FURTHER ORDERED that the above-captioned case is **DISMISSED IN ITS ENTIRETY**.

[Signed]
Colleen Kollar-Kotelly
United States District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LORETTA M. YOUNG,
Plaintiff,

v. Civil Action No. 96-02733 (CKK)

WILLIAM DALEY,
SECRETARY OF COMMERCE,
Defendant

MEMORANDUM OPINION

The Plaintiff's Amended Complaint set forth four claims in which she challenges her separation from her position with the U.S. Department of Commerce, Minority Business Development Agency due to a reduction in force action within the Agency. She alleged that she was separated in violation of Article I, § 9, cl. 8 (prohibition against establishment of nobility) and in violation of the First Amendment, Fifth Amendment Due Process

Clause, and the equal protection rights embodied int he Fifth Amendment. Her claims for violation of the First and Fifth Amendment Due Process Clause were dismissed previously by stipulation of the parties. The parties have filed cross-motions for summary judgment on the remaining Nobility Clause claim and the Equal Protection claim. Both parties filed Oppositions and Replies to their opposing party's motions. The Court held a hearing on the cross-motions, and took the motions under advisement at the conclusion of the hearing.

Upon considering the cross-motions, the oppositions, the replies, the arguments made on the record, and the relevant law, the Court concludes that the Defendant's motion for summary judgment

should be granted, and that the Plaintiff's motion should be denied.

BACKGROUND[1]

The Plaintiff is a 57 year old female who formerly was a full-time permanent career status, non-veteran civil service employee of the U.S. Department of Commerce, Minority Business Development Agency (MBDA). The Plaintiff started working for the federal government on July 2, 1962. Plaintiff was separated from her position with the MBDA as Program Analysis Officer on December 21, 1996.

Prior to separation, the MBDA informed the Plaintiff that she had been reached for reduction in force (RIF)

[1]The relevant facts in this case are few, and are not disputed by either party. The Court therefore finds it unnecessary to consider the Defendant's repetitious arguments regarding the Plaintiff's purported failure to provide Rule 108(h) statement.

action and that her position would be abolished due to reorganization. This RIF was the basis for the Plaintiff's separation in December of 1996. Section 3502 of the Retention Preference, Restoration, and Reemployment Act, 5 U.S.C. §3501 (1994) provides that "the Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to...[m]ilitary preference." 5 U.S.C. §3502(a)(2)[hereinafter "veterans' preference statute"]. In the instant case, the MBDA had determined pursuant to its regulations, 5 C.F.R. §351.201(a)(2), that budget reductions required the abolition of certain positions and units. The MBDA concluded that it would reduce the number of positions at headquarters in

areas of administrative support, and consequently the MBDA abolished several divisions at headquarters, including the Plaintiff's Planning and Evaluation Division.

In deciding whether the Plaintiff should be released, the MBDA relied on 5 C.F.R. §351.501(a), which provides that:

> [c]ompeting employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order...(1) by tenure group I, group II, group III; and (2) Within each group by veteran preference subgroup AD, subgroup A, subgroup B; and (3) Within each subgroup by years of service as augmented by credit for performance...beginning with the earliest service date.

5 C.F.R. §351.501(a). The Plaintiff was the only employee in her competitive level, and thus was released because her position was abolished. The Plaintiff was classified as a career, non-probationary

employee in tenure group I, and veterans preference subgroup B. The MBDA concluded that the Plaintiff's retention standing relative to other employees did not permit her reassignment, and thus she was separated.

In her Motion for Summary Judgment, the Plaintiff argues that her equal protection rights as guaranteed by the Fifth Amendment of the United States Constitution were infringed by Congress' enactment of the veterans' preference statute. She also contends that the veterans' preference statute violates Article 1, § 9, cl.8 of the United States Constitution.

ANALYSIS

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate pursuant to Fed.R.Civ.P. 56 if:

> the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). The movant bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thereafter, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts

showing that there is a genuine issue for trial.'" 477 U.S. at 324.

In deciding a motion for summary judgment, the court must believe all of the evidence produced by the non-movant, and must draw all favorable inferences in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 255, 255 (1986). Ultimately, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251.

II. THE EQUAL PROTECTION CLAIM

The Defendant moves for summary judgment on the grounds that the Supreme Court in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), held that the veterans' preference

statute in Massachusetts, which is analogous to the statute challenged in the instant case, was not violative of the equal protection clause of the Fourteenth Amendment. The Defendant argues that Feeney forecloses any argument in this case that the Plaintiff's equal protection rights guaranteed by the Fifth Amendment were violated by the federal veterans' preference statute, 5 U.S.C. § 3502(a)(2).

In Feeney, the Supreme Court addressed the claim of a female non-veteran who challenged the Massachusetts veterans' preference statute as applied in the hiring context. Feeney, 442 U.S. at 257. The Massachusetts statute, like the statute at issue in the instant case, required preferential treatment for veterans in employment decisions. Id. at 262. Specifically, the Massachusetts

statute directed veterans to be ranked above other candidates for civil service employment opportunities with Massachusetts. Id.

The Supreme Court commenced its analysis of the Feeney case by explaining the various factors that trigger different levels of scrutiny. The Court noted that classifications based on race are "presumptively invalid and can be upheld only upon an extraordinary justification." Feeney, 442 U.S. at 272 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)). Similarly, gender classifications "require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." Feeney, 442 U.S.

at 273.[2] Basic classifications, however, simply must be rationally based. Id. at 271-72.

The Court noted, however, that a statute that is facially neutral may nonetheless be unconstitutional because it masks a discriminatory purpose. See id. (referring to and discussing Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252 (1977)). In both Davis and Arlington Heights, the Supreme Court

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[2]The standard of scrutiny for gender-based classification is not quite as demanding as that applied in race-based cases, as the Supreme Court has "reserved the most stringent judicial scrutiny for classifications based on race or national origin." United States v. Virginia, 116 S.Ct. 2264, 2275 n.6 (1996). Thus, "without equating gender classifications, for all purposes, to classifications based on race or national origin, the [Supreme] Court...has carefully inspected official action that closes the door or denies opportunity to women (or to men)." Id. at 2275.

considered whether a facially neutral rule was in fact racially discriminatory, where there was a disparate impact on African-Americans. The Supreme Court held in each case that the presence of a disparate impact alone did not render the state action unconstitutionally discriminatory; rather the impact had to be the result of a discriminatory purpose. See Arlington Heights, 429 U.S. at 268; Davis, 426 U.S. at 245-46. The Supreme Court found no evidence that racial discrimination was a factor in the rule-making in either Davis and Arlington Heights, and thus concluded that there was no equal protection violation. See Arlington Heights, 429 U.S. at 270-71; Davis, 426 U.S. at 247-48.

The Feeney Court reiterated the principle that "the Fourteenth Amendment[3] guarantees equal laws, not equal results," Feeney, 442 U.S. at 272. The Court held that Davis and Arlington Heights "principles apply with equal force to a case involving alleged gender discrimination." Id. at 274. Thus, the Supreme Court in Feeney focused on a two-part inquiry: "whether the statutory classification is indeed neutral int he sense that is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects

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[3]Although the Plaintiff in the instant case proceeds on the grounds that the instant statute violates the equal protection rights embodied in the Fifth Amendment Due Process clause, rather than under the Fourteenth Amendment Equal Protection clause as in Feeney, the analysis is the same. See Buckley v. Valeo, 424 U.S. 1, 93 (1975).

invidious gender-based discrimination." Id.

According to the Plaintiff, the Supreme Court's decisions in United States v. Virginia, 116 S.Ct. 2264 (1996), Adarand v. Pena, 115 S.Ct. 2097 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) - all decided since Feeney - have changed the standard to be applied in the instant case. The Plaintiff reads these cases collectively to require the application of a heightened standard of scrutiny where there is an affirmative action plan based on gender. The Plaintiff's position that the Virginia, Adarand, J.A. Croson Co., and Wygant cases require stricter scrutiny than in Feeney in dependant on the Plaintiff's characterization of the

statute in the instant case as an affirmative action plan that actually is based on gender.

This Court agrees that the cases of Virginia, Adarand, J.A. Croson, Co., and Wygant, do require courts to employ a heightened standard of scrutiny in assessing a challenge to an affirmative action plan that on its face discriminates or classifies based on gender or race. Yet in the instant case, the Plaintiff admits that the statute at tissue is not facially discriminatory based on gender. Thus, before this Court is required to apply the heightened standard of scrutiny, the Plaintiff must satisfy one of the tests enunciated in Feeney - which is the stumbling block that the Feeney plaintiff could not overcome.

Although the Plaintiff's case is identical to that of the plaintiff in Feeney in all material aspects, the Plaintiff, unpersuasively, attempts to distinguish her case from Feeney by arguing that the factors that the Supreme Court found lacking in Feeney in fact are present in the instant case. As to the first part of the Feeney test, namely whether the statute is either overly or covertly based on gender, the Plaintiff admits that the statute on its face does not classify based on gender. She argues that while the statute does not discriminate overly based on gender, it does so covertly. The Plaintiff attempts to support this position by noting that the military manifestly excludes women from service, and therefore women are intentionally prevented from achieving the

status of a veteran. The Plaintiff concludes that the veterans' preference thus deliberately precludes women from receiving the benefits of the statute. The plaintiff in Feeney made a similar argument, yet the Supreme Court rejected it, noting that "[t]he enlistment policies of the Armed Services may well have discrimination on the basis of sex [but] the history of discrimination against women in the military is not on trial in this case." Feeney, 442 U.S. at 278 (internal citations omitted). While the Plaintiff professes that she in fact is challenging the history of discrimination against women in the military, this assertion is completely unfounded. The Plaintiff has not brought an action challenging the discriminatory policy int he military, and she does not even claim

that she sought entry into the military but was denied participation. Rather, she simply takes note of the military's exclusionary policy. The narrow issue in the instant case, as in Feeney, is whether there is any evidence that the veterans' preference was established in whole or part to discriminate against women. Like the Feeney case, where the Supreme Court concluded that the veterans' preference excludes mostly women because they are non-veterans, and not because they are women, this Court likewise finds here that the veterans' preference RIF statute distinguishes only on the basis of veteran status, and makes no distinction, either overtly or covertly, based on gender.

The Plaintiff claims that she, unlike the Feeney plaintiff, can establish Congress' intent to discriminate against

women in enacting the veterans' preference, so that she meets the second Feeney test. She suggests that given the fact that Congress imposed a discriminatory policy in the military, this court should conclude that Congress intended the veterans' preference to have the effect of excluding women from its benefits. The Plaintiff merely asserts that "[t]he operation of veterans' preference in a reduction-in-force is not gender-neutral" and the impact on women is so overwhelmingly disproportionate that Congress could have intended only to discriminate. Thus, in support of the argument that an invidious purpose does exist, the Plaintiff predominantly relies on the inference that may be drawn from the disparate impact of the statute. The same arguments were advanced in Feeney,

and the Supreme Court rejected them because "[t]o reason that it was [discrimination], by describing the preference as inherently non neutral or gender biased in merely to restate the fact to impact, not to answer the question of intent." Feeney, 442 U.S. at 277. Where "impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof." Feeney, 422 U.S. at 279 n.25.

The purpose of the veterans' preference statute rebuts any claim that the statute either is not gender-neutral, or is the product of a desire to

discriminate against women. The goal of the statute was not to distinguish between men and women, but to distinguish veterans from non-veterans. The statute embodies the

> the idea that when a man is selected by the country to serve in battle and give his life, if need be for the preservation of this country and its institutions, that same man is certainly entitled to some degree of preference for positions in Government departments and agencies in serving in his country in peacetime. It is a reward to a man for patriotic duties well performed; it encourages our young men and women to serve their country in an hour of need and it makes them feel they have given their all or offered to give their all in defense of this country and its institutions, that a grateful country will recognize their sacrifice and service when peace comes by giving them preference for service in various capacities with their Government.

Preference in Employment of Honorably Discharged Veterans Where Federal Funds are disbursed, 78th Cong. 2d Sess. 1, 8 (1944) (statements of Congressman Joe Starnes, hearing before the Senate Committee on Civil Service) (emphasis added).

The Plaintiff directs the Court's attention to a hearing before the Senate Committee on Civil Service for the proposition that the statute was enacted in order to discriminate against women. In these statements, Congressman Charles M. LaFollette submitted an amendment that would grant veterans' preference tot he spouse of a disabled or deceased servicewoman. Congressman LaFollette, as noted by the Plaintiff, acknowledges that some people were concerned that by allowing husbands of disabled servicewomen

to have veterans' preferences, the preference for disabled servicemen would be diluted. Id. at 15 (statements of Congressman LaFollette). Nonetheless, the statute, as enacted, provides a preference for both a widow and a widower, as well as a husband or wife of a veteran. See 5 U.S.C. §2108(3)(D),(E). Moreover, during the hearing before the Senate Committee on Civil Service in 1944, Congressman Joe Starnes testified that the purpose of the veterans' preference was to "encourage our young men and women to serve their country in an hour of need." Preference in Employment of Honorably Discharged Veterans Where Federal Funds are Disbursed, 78th Cong. 2d. Sess. 1, 11 (1944)(statements of Congressman Joe Starnes, hearing before the Senate Committee on Civil Service).

The fact that the statute has an adverse effect on men as well as women, and that some women will benefit from the statute, further undermines the Plaintiff's position. See Feeney, 442 U.S. at 275; Jackson v. Thornburgh, 907 F.2d 194, 196 (D.C. Cir. 1990). In total, the record in this case, as in Feeney, is devoid of any evidence that "this preference for veterans was originally devised or subsequently re-enacted because if would accomplish the collateral goal of keeping women in stereotypic and predefined place" in the workplace. Feeney, 442 U.S at 279. There may be evidence that Congress enacted the veterans' preference "in spite of" its adverse effects, but there simply is no evidence that it was enacted "because of" its impact of women. Id. Absent such a

showing, the Plaintiff is not entitled to heightened scrutiny of the statute. See Jackson v. Thornburgh, 907 F.2d at 196.

Accordingly, the Court's inquiry turns to whether the veterans' preference statute is "rationally related to legitimate governmental interests." Id. (citing McGinnis v. Royter, 410 U.S. 263, 270 (1973)). The Court's foregoing discussion of the purpose of the veterans' preference convinces the court that the statute was enacted to accomplish a legitimate government interest, namely one of encouraging men and women to participate in military service, and of expressing the country's appreciation for their service. See Preference in Employment of Honorably Discharged Veterans Where Federal Funds are Disbursed 78th Cong. 2d Sess. at 8 (statements of

Congressman Joe Starnes, hearing before the Senate Committee on Civil Service); see also Anthony v. Massachusetts, 415 F.Supp. 485 (Mass. 1976)(finding that goals of the Massachusetts veterans' preference statute were legitimate government interest). Furthermore, the operation of the statute is rationally related to fostering these legitimate interests. The veterans' preference "has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, [and] to ease the transition from military to civilian life." Feeney, 442 U.S. at 265; Boykin v. Strickland, 264 S.E.2d 225 (Ga. 1980) (holding constitutional the Georgia veterans' preference regulation as applied to a RIF). The Court finds unpersuasive the Plaintiff's claim that this case is

distinguishable from Feeney because this case involves the application of the veterans' preference to a RIF, rather than to hiring. See Boykin, 264 S.E.2d at 225 (rejecting claim that veterans' preference regulation, while constitutional as to hiring practices, is unconstitutional as to a RIF). Accordingly, the Court concludes that the instant veterans' preference statute does not violate the Plaintiffs' equal protection rights under the Fifth Amendment.

The Plaintiff's position is facially and emotionally appealing. Nonetheless, the law of equal protection does not provide relief for imprudent laws, but only for discriminatory laws. See Feeney, 442 U.S. at 280. The Plaintiff may have demonstrated that the "substantial edge granted by [the veterans' preference

statute] reflect[s] unwise policy," but the Plaintiff has offered no evidence that the "statute reflects a purpose to discriminate on the basis of sex." Id.

III. ARTICLE 1, SECTION 9, CLAUSE 8: "NO TITLE OF NOBILITY"

The Plaintiff's Amended Complaint is also based on the theory that the veterans' preference statute establishes a nobility, which violates Article 1, Sec. 9, Cl. 8 of the United States Constitution. Article 1, Sec. 9, Cl 8 provides that "No title of Nobility shall be granted by the United States." While there is little law regarding what constitutes a nobility class, the establishment of the Nobility Clause appears to have been related to a desire to prevent "the Union from the Evils of Aristocracy." Max Farrand, Records of Federal Convention, Vol. III, at 150.

Concerned with ancient feudal traditions, and being "products of the Age of Enlightenment, [the Framers of the Constitution] set out to establish a society that recognized no distinctions among white men on account of birth." Fullilove v. Klutznick, 448 U.S. 487, 531 n.13 (1980) (Stewart, J., dissenting). The founding principle of this nation is that "the law would honor no preference based on lineage." Id.

Indeed, at the Constitutional Convention, the issue of the lack of a nobility class in this nation was raised in reference to this nation's founding principle of equal participation and representation. See Max Farrand, Records of Federal Convention, Vol. IV., at 28-35. It was noted that Great Britain's system of government would not suit this nation

simply because Great Britain historically had a class of nobility and aristocracy with interests distinct from the king and the common people, which therefore required that the nobility have a separate and distinct role in the governance of Great Britain. The United States of America, however, being founded upon the principles of equality among the citizens and embracing a concerning for equal participation and representation in the government, would not have the proper roots to support a nobility class. Id.

Thus, the concept of a nobility appears to be related to whether or not a nation recognizes equality among its citizens. By concluding infra that the veterans' preference does not violate equal protection, the Court is precluded from finding that the veterans' reference

creates a nobility, i.e. a class of people that is unequal to others. Furthermore, the Court notes that the federal government does not unilaterally grant a person veteran status. Rather, the veteran's status arises out of the veteran's service in the military. The fact that the veterans' preference arises out of a quid pro quo, undermines the argument that the veterans' preference creates a nobility. C.F., Zobel v. Williams, 457 U.S. 55, 70 n. (Brenna, J., dissenting) ('"no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public service.'" (quoting the Virginia Declaration of Rights (1776), in R. Rutland, The birth of the Bill of Rights, App. A (1955)). Embodied in the term

nobility is the concept of a right conferred upon a person based on lineage or blood. See Adarand, 115 S.Ct. at 2097 (Scalia, J. dissenting) (citing the Nobility Clause in support of claim that dispositions based on race or blood would violate the Constitution's focus); Matthews v. Lucas, 96 S.Ct. 2755, 2769 (1976)("[T]he rationale behind the prohibition against the grant of nobility would prohibit the United States from attaching any badge of ignobility to a citizen at birth."); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.") The existence of a quid pro quo for the benefits of the preference

simply does not comport with the underpinnings of the concept of a nobility class.

CONCLUSION

For the foregoing reasons, the court concludes that as a matter of law, the Defendant is entitled to summary judgment on the remaining causes of action in the Complaint. The Plaintiff cannot, as a matter of law, establish a violation of either the equal protection rights embodied in the Fifth Amendment, or a violation of the Nobility Clause. An Order granting the Defendant summary judgment, and dismissing the case accompanies this Opinion.

_____ /s/ _____
DATE COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LORETTA M. YOUNG,
Plaintiff,

v. Civil Action No.
96-02733 (CKK)

WILLIAM DALEY,
SECRETARY OF COMMERCE,
Defendant

ORDER

Upon considering the cross-motions for summary judgment, the oppositions, the replies, the arguments presented on the record on October 31, 197, and the relevant law, it is this 27 day of April, 1998 hereby

ORDERED that the Defendant's Motion to Dismiss, or in the Alternative, for Summary Judgment, is **GRANTED**; and it is

FURTHER ORDERED that the Plaintiff's Motion for Summary Judgment is **DENIED**; and it is

FURTHER ORDERED that the above-captioned case is **DISMISSED IN ITS ENTIRETY**.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE